STATE OF MAINE
PUBLIC UTILITIES COMMISSION

Docket No. 2002-687

November 13, 2002

PUBLIC UTILITIES COMMISSION
Proposed Amendments to Chapters 280, 285 and 288

NOTICE OF RULEMAKING

WELCH, Chairman; NUGENT and DIAMOND, Commissioners

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## I. SUMMARY

In this Notice of Rulemaking, we propose amendments to Chapters 280 (Provision of Competitive Telecommunications Services), 285 (Maine Telecommunications Education Access Fund) and 288 (High Cost Universal Service Fund). We propose all of these amendments for the purpose of facilitating the implementation of the High Cost Universal Service Fund (also known as the Maine Universal Service Fund or MUSF).

The purpose of the amendments to Chapter 280 is to make clear the obligations of Maine local exchange carriers to implement access rates that comply with the requirements of 35-A M.R.S.A § 7101-B (the "access parity" statute) and to establish a schedule for that compliance.

The purpose of the amendments to Chapter 285 is to make the Rule conform in some important respects to provisions contained in Chapter 288, which was enacted more recently. The same Administrator administers both Funds. We propose to make the contribution obligation to apply to exactly the same group of contributors, to make payments into the Funds on the same schedule and to make the methods of calculating the amounts each contributor must pay to each Fund consistent under both Chapters.

The purposes of the amendments to Chapter 288 are to establish an application process, to clarify the obligations of recipients to establish access rates that are no higher than their interstate access rates (consistent with the proposed amendments to Chapter 280), to make clear that assessments apply only to retail revenues (rather than all intrastate revenues), to clarify the time periods for revenue reporting by contributors, and to limit the amount of the surcharge for USF contributions that interexchange carriers may impose on their customers to reflect the savings in access costs these carriers will experience as a result of orders granting USF to rural local exchange carriers.

## II. PROPOSED AMENDMENTS TO CHAPTER 280

There has been some uncertainty about the need and timing for independent incumbent local exchange carriers to implement access rates that comply with the requirements of 35-A M.R.S.A. § 7101-B (the access parity statute). There has also been some uncertainty expressed about the meaning of the statute. To some extent, the uncertainty has been caused by prior Commission orders and informal statements.

> 35-A M.R.S.A. § 7101-B states:
> Notwithstanding any other provision of law, the commission by May 30, 1999 shall establish and every 2 years reestablish intrastate access rates that are less than or equal to interstate access rates established by the Federal Communications Commission.

Recently, in *Public Utilities Commission, Investigation of the Rate Design of Community Service Telephone Company*, Docket No. 2001-827, Order Rejecting Stipulation (November 13, 2003) (*"CST Order")*, we addressed a prior interpretation of the statute. That interpretation stated that LECs could establish intrastate access rates that would produce the same amount of intrastate revenue as the interstate revenue they received from the National Exchange Carriers Association (NECA)("NECA disbursements").

A provision allowing LECs to use NECA disbursements first appeared in this Chapter at section 8(J). It permitted a carrier, for the May 30, 1999 access rate filing only, to file intrastate access rates "that mirror the structure and level of interstate access rates (or interstate NECA-pool disbursements)." The Order in the rulemaking that adopted section 8(J) contained no discussion about the provision. *Public Utilities Commission, Proposed Amendment of Chapter 280 to Achieve Parity with interstate Access Rates By May 30, 1999*, Docket No. 97-319, Order Adopting Rule (December 3, 1997). A later order described our rationale for allowing the use of NECA disbursements, rather than actual NECA rates, on the ground that "ITCs could have withdrawn from the NECA pool and filed their own interstate access rates, mirrored those rates on the intrastate side, and argued that they had complied with the letter of the law." *Maine Public Utilities Commission, Investigation into Rates Pursuant to 35-A M.R.S.A. § 7101-B*, Docket Nos. 98-891 et al., Interim Order at 3-4 (January 28, 1999) (*Interim Order*).[1]

NECA files a single set of averaged access tariffs on behalf of those local exchange carriers that choose to participate. It pools the access revenues and pays participating carriers based on those carriers' actual costs or pursuant to an average schedule formula. Thus, some carriers contribute more in interstate access revenues than they receive in disbursements; others contribute less than they receive. Most of Maine's rural incumbent local exchange carriers (ILECs) are in the latter category. If

[1] Prior to the *Interim Order*, Chapter 280, § 8(J) The *Interim Order* did state that it was the Commission's "objective," by May of 2001, that intrastate access rates should not exceed interstate access rates.

those carriers chose to establish intrastate access rates that were designed to produce the same amount of intrastate revenue as the interstate revenues received as NECA disbursements, their intrastate rates would necessarily exceed their interstate rates (the averaged rate filed by NECA).

In the *CST Order*, we ruled that there was "no legal justification for continuing to allow access rates to be set at disbursement levels," and stated that the statute was "clear on its face." The statute states that the Commission must establish "intrastate access *rates* that are less than or equal to interstate access *rates*." (emphases added). As we stated in *CST*, the access parity statute does not say that access rates must be less than or equal to "interstate access rates that could have been approved by the FCC, whether filed and approved or not."

Accordingly, the proposed amendments to section 8 of the Rule will require local exchange carriers to establish intrastate access rates that are "less than or equal to the most recent interstate rates for that carrier that became effective on or before May 30" of the year made applicable by the statute. That requirement will be mandatory for all local exchange carriers on May 30, 2003. Various provisions in the proposed revision will establish different dates for compliance with the access parity requirement between the effective date of the amendment and May 30, 2003. Those different dates apply to different categories of LECs, as explained below.

The proposed Section 8 that is attached to this Notice replaces existing section 8 in its entirety. Existing section 8 already contained a provision (subsection 8(J)) stating that subsections A, B, C, D, E, G and H of Section 8 expired on May 30, 1999. We propose to retain the substance of existing subsection F (the bar against access charges that apply directly to end-users) in a new subsection E. We propose to delete existing subsections I (which required an access rate reduction in 1997) and J (which addressed the access reductions required for 1999).

For complying with the requirement to establish intrastate access rates between the effective date of the proposed amendments and May 30, 2003, we have proposed dates for three groups of carriers. The carriers in the first two groups are all "rural incumbent local exchange carriers," i.e., independent telephone companies (ITCs). We have proposed a definition of "rural incumbent local exchange carrier" (or rural ILECs) as a new subsection L of section 2. It is based on separate federal definitions for "incumbent" LECs and "rural" LECs contained in the Telecommunications Act. We also used these definitions in Chapter 288, the Universal Service Fund Rule.

The first category of LECs is described in proposed Section 8(B)(1). These are "rural ILECs" that lowered their intrastate access rates to the level of interstate rates established by NECA in 1999. These carriers implemented those rates in May of 2001 pursuant to rate proceeding stipulations (all similar) approved by the Commission in which both the carriers and the Commission agreed that no rate case would be initiated for a specified time span, unless certain exogenous events occurred. These companies are known as "stay-out" companies.[2] They are presently not in compliance with the access parity statute as interpreted above and in the *CST Order*. On May 30, 2001, they should have implemented intrastate access rates that were equal to the interstate rates then in effect, instead of the 1999 rates. The correct rates would have been the rates established by NECA in the summer of 2000 (or possibly some later rates established between the summer of 2000 and May of 2001).

Proposed subsection (B)(1) contains two alternatives. The First Alternative states that, within 30 days after the effective date of the amendments, the "stay-out" carriers must establish intrastate access rates "less than or equal to the most recent interstate rates for that carrier that became effective on or before May 30, 2001."

We understand that there was very little change (about 1.2 cents per minute) between the 1999 and 2000 interstate access rates established by NECA. Therefore, it is doubtful that any of these companies will need to adjust their stay-out periods, at least immediately.

The second category of LECs is described in proposed Section 8(B)(2). These are rural ILECs that have not lowered their intrastate access rates to any level of interstate rates established by NECA in 1999 or any other year. These carriers were permitted to maintain those high rates pursuant to rate proceeding stipulations (all similar) approved by the Commission. These companies are known as "amortization" companies because they are amortizing past excess revenues to keep future rates lower.[3] Nevertheless, because of their high costs, they needed further support. Allowing these companies to maintain access rates well in excess of their interstate rates that were established by NECA served as an informal universal service funding (USF).

The existence of the formal Maine Universal Service Fund (MUSF), implemented under the authority of 35-A M.R.S.A. § 7104 and Chapter 288 of these Rules, removes the need for informal USF that is provided through access rates that exceed levels permitted by the access parity statute. The MUSF, however, will not be able to make payments to recipient rural local exchange carriers until the second quarter of 2003. Accordingly, out of practical necessity, we propose to allow all but one of this second group of LECs to maintain their existing access rates, even though they exceed statutory maximums, until April 1, 2003 (or such later date as the Commission may

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[2] They include: Saco River Telegraph and Telephone Company, Standish Telephone Company, Maine Telephone Company, The Pine Tree Telephone and Telegraph Company, Oxford County Tel. and Tel. Company Telephone Company, Oxford West Telephone Company, Sidney Telephone Company, China Telephone Company, Union River Telephone Company and Northland Telephone Company.

[3] They include: Community Service Telephone Company, Tidewater Telephone Company, Lincolnville Telephone Company, Unitel, Mid-Maine Telephone Company and the seven TDS companies: Cobbosseecontee, Warren, Hampden, Island, Somerset, Hartland & St. Albans, and West Penobscot.

establish by a notice).[4] Under proposed section 8(B)(2), these carriers must reduce their access rates to the level of their 2000 interstate rates by April 1, 2003, whether or not they apply for (or will receive) universal service funding. This provision is consistent with a ruling in an earlier order:

> Once the Fund is operational, we will not permit any ILEC to maintain intrastate access rates that exceed its interstate (NECA 5) levels. A rural ILEC that cannot meet its revenue requirement with intrastate access rates that are equal to its interstate rates and local basic rates that comply with the requirement of Chapter 288 may apply for USF. We will not permit rural ILECs to use access rates that exceed interstate levels as a *de facto* USF and thereby avoid raising basic local rates. A rural ILEC may, of course, maintain whatever local rates it wants, as long as it reduces its intrastate access rates to NECA 5 levels and foregoes universal service funding.

*Unitel, Proposed Rate Change*, Docket No. 2000-813, Order Rejecting Second Stipulation (October 1, 2001) at 5 (*Unitel Order*) .

We note that proposed Section 8(B)(2) will result (in combination with Section 8(D)) in the "amortization" companies having to reduce their access rates twice within a two month period (April 1 and May 30, 2003). We also note that the amortization companies are in a fundamentally different position from the "stay-out" companies. The "stay-out" companies presently have access rates that are almost at the statutory level (1999 interstate rates rather than 2000 interstate rates). Allowing those companies to continue with those rates until May 30, 2003 (as would be permitted by the Second Alternative of Section 8(B)(1)) is arguably a minimal violation. By contrast, it is more difficult to justify permitting the amortization companies to continue receiving informal USF, through access rates that exceed the statutory level, once the MUSF is operational. *See Unitel Order, supra.*

We are uncertain whether it is reasonable to require the amortization companies to reduce their access rates twice in a two-month period.[5] If that is deemed unduly burdensome, two alternative approaches are possible. The first would be to have these companies reduce their intrastate access rates to the 2002 interstate level on April 1, 2003. The second would be to maintain the status quo (access rates well above until May 30, 2003, at which time they would implement a reduction to the 2002 interstate level. The latter course necessarily means that the USF would not provide funding to the amortization companies until May 30, 2003 because they would continue to receive

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[4] The one company that must reduce its access rates at least to 2000 NECA levels sooner is Community Service Company (CST). As explained in the *CST Order*, CST has stated that it does not presently need USF. It follows that it does not need informal USF between now and April 1, when the Fund will be operational.

[5] For the reasons stated above, this discussion does not apply to CST.

informal USF, which is borne entirely by IXCs rather than the broader group of carriers that must contribute to the MUSF.

We seek comment on whether the amortization companies should be required to reduce access rates to 2000 interstate level on April 1, 2003 (which means that they will have to reduce them again on May 30, 2003); to reduce them to the 2002 level on April 1, 2003 (thereby avoiding the need to reduce them twice); or to retain the current rates until May 30, 2003 and then reduce them to the 2002 level (which avoids the double step but perpetuates what is arguably substantial non-compliance with the statute beyond when the Fund is operational). We note that if we require the amortization companies to reduce access rates to 2002 levels on April 1, 2003, they will not be deprived of revenue. The initial amount of their USF will be higher, and it will not be necessary for the Commission and USF Administrator in May of 2003 to adjust the amount a company receives. LECs should provide specific detail concerning the extra effort necessary for two access rate changes rather than one.

The third category of LECs is described in proposed section 8(C) as “all other.” This category includes Verizon and all competitive LECs (CLECs). The proposed provision states that this group of LECs must implement rates that are less than or equal to their interstate rates for 2000 within 30 days after the effective date of the amendments. We have no reason to believe there are any carriers in this category that are not in compliance already.

Finally, proposed subsection D requires all local exchange carriers, by May 30, 2003, to implement intrastate access rates that are less than or equal to their interstate rates that are in effect on that date. The provision goes on to say that all LECs must re-establish such rates every two years thereafter.

## III. PROPOSED AMENDMENTS TO CHAPTER 285

Chapter 285 governs contributions to and payments from the Maine Telecommunications Education Access Fund (MTEAF) to qualified schools and libraries. In this rulemaking we address issues on the contribution side, particularly the relationship between this Rule and Chapter 288, which governs the Maine Universal Service Fund (MUSF). 35-A M.R.S.A § 7104-B, which required the Commission to establish the MTEAF, also requires the Commission to “integrate the collection of the charge with any state universal service fund developed by the commission.” Through the proposed amendments, we seek to make collection of the contributions of the two Funds as similar as possible in order to make collection more efficient and convenient both for contributors and for the Administrator, who administers both Funds.

### A. Amendments to Definitions

We propose amendments to the definition of “Contributing Telecommunications Carrier” in Section 1(A) to make as clear as possible that the "telecommunications carriers" that must contribute to each Fund are the same. Proposed Section 1(A) would refer specifically to interexchange carriers (IXCs), local exchange carriers (LECs), mobile telecommunications carriers and paging providers. We recognize that sections 7104 (USF) and 7104-B define who must contribute to each Fund somewhat differently. In particular, Section 7104-B (2) and (8) refer to "telecommunications providers" and "other entities" (such as cable television companies and internet service providers) that the Commission determines offer two-way "interactive communications services comparable to those offered by telecommunications providers." (At present, the Commission has made no such determinations.) By contrast, section 7104(3) requires contributions from "providers of intrastate telecommunications service," stating specifically that this category includes "providers of radio paging service and mobile telecommunications services."

Notwithstanding these different formulations, we believe they are intended to describe essentially the same potential group of contributors. Although the current version of Chapter 285 does not specifically mention paging providers and mobile telecommunications carriers, they clearly are telecommunications providers within the meaning of that Chapter (and section 7104-B) and those carriers have been contributing to the MTEAF. We also have little doubt that we could find that internet and cable providers could be considered to be telecommunications providers under section 7104 and Chapter 288 if they were to offer two-way interactive communications services.

At least for the present, we intend that the entities that contribute to each Fund will be identical.

We also propose to amend Section 1(A) to state that the contribution requirement applies only to those carriers that had revenues of $12,500 or more during the previous quarter. This same limitation is contained in the USF Rule. At present, the Administrator receives a large number of very small checks (less than $10) from a large number of MTEAF contributors. The total amount of revenue from those contributors is quite small, but creates a significant administrative burden for the contributors and the Administrator. We also propose to state this limitation in Section 2(A) of the Rule.

Finally, we propose new definitions of "mobile telecommunications carrier" and "radio paging service provider" (Sections 1(B) and 1(E)) because of the use of those terms in Section 1(A). The proposed definitions are identical to those presently in Chapter 288.

B. Amendments to Section 2

The proposed limitation in Section 2(A) of the contribution requirement to telecommunications providers with $12,500 in revenues in the previous quarter is discussed above in connection with Section 1(A). We also propose to make clear that the assessment applies to "billed intrastate retail revenues" and replace the statutory term "retail charges" with that phrase. (We propose the same change for the definition in Section 1(A).) We believe the replacement phrase is clearer; we do not believe there is a substantive difference. The USF rule presently applies to "intrastate retail revenue," and we are proposing to add the word "billed" to that phrase so that assessments will apply to the same amount of revenues under each Fund. Finally, we propose to eliminate the phrase "excluding interstate toll or interstate private line services" (which is derived from 35-A M.R.S.A § 7104-B) because we have proposed to make the contribution requirement apply to "intrastate" revenues, thereby making the interstate exclusions redundant.

In Section 2(B), we propose to require contributors to pay a specified percentage of their intrastate retail revenues rather than a percentage of "retail charges to be collected." This change (if it is actually a change) will place the MTEAF on the same basis as the USF. We also propose that the Administrator add an amount for amounts that cannot be collected from contributing telecommunications providers. This provision is identical to that contained in the USF Rule.

Finally, we propose to add new subsection C, which is identical to a provision contained in Chapter 288. It addresses charges by various carriers that apply to both interstate and intrastate service, such as minimum charges that may or may not include a usage allowance. Recently, some carriers have also implemented combined local (definitionally intrastate) and interexchange (interstate and intrastate combined) services. The proposed provision states that the MTEAF assessment applies to all revenues derived from these jurisdictionally mixed, unseparated charges unless the contributor proposes, and the Commission or the Director of Finance approves, a method for allocating those revenues between intrastate and interstate. Normally, minutes of use will act as a reasonable way to allocate interexchange service. Where local service is combined with interexchange service, a reasonable method for allocation would be to consider the portion of the rate that is equal to the carrier's stand-alone rate for local service as local (and, hence, intrastate).

We propose to amend subsection D (presently subsection E) to make clear that the existing obligation to turn over all funds collected under the surcharge does not necessarily complete a carrier's payment obligation, which, as discussed above, we have proposed to define as an obligation to pay a certain percentage of billed intrastate retail revenues.

C. Section 3

Proposed Section 3 is "new." Most of it exists presently, however, as subsections C – E of Section 2. We propose to split off this potion of Section 2 in order to make clearer the division between the contribution (by telecommunications carriers) and collection (by carriers from retail customers) functions of the Rule.

Although extensively reworded, we intend no substantive change in subsection A (formerly subsection C of Section 2).

Proposed subsection B (which is not found in the present Rule) is identical to an equivalent provision in Chapter 288. It is the retail version of the allocation provision (proposed section 2(C), discussed above) that allows allocation of jurisdictionally mixed, unseparated charges. This provision states that a surcharge for the MTEAF cannot apply to any such charge unless the carrier obtains approval for an allocation method.

D. Other Changes

Existing Sections 3 – 5 would be renumbered as Sections 4 – 6 to accommodate the addition of proposed "new" Section 3.

## IV. PROPOSED CHANGES TO CHAPTER 288

We propose four substantive changes to Chapter 288. The first is to make clear, in section 2(K) (definition of "retail revenue"), that the revenues that are subject to assessment for the USF are intrastate retail revenues that a carrier "bills" to customers. As discussed above in connection with the proposed amendments to Chapter 285, § 2(A), this subjects the same revenue to assessment under both Rules; "billed revenues" is consistent with the statutory requirement for the MTEAF that assessments apply to "retail charges."

The second proposed change is to add an application process in Section 3(B). (Existing sections 3(B) - (G) will be re-lettered as 3(C) – (H)). Proposed Section 3(B) will require a rural LEC to request funding from the USF and, with the request, to provide certain information that will be necessary to convert, on a revenue-neutral basis, the revenues obtained under existing intrastate access rates to those that will be realized under future access rates. The provision also requires carriers whose local rates are not yet at Verizon levels to file a plan for achieving those levels that is consistent with the requirements elsewhere in Section 2. We also propose a complementary change in Section 2(F) (presently 2(E)) that will require USF orders issued by the Commission to establish a plan for increasing rates to Verizon levels.

In many cases, it will also be necessary for a Company to undergo a revenue requirement proceeding prior to receiving USF. Section 3(C) (presently 3(B)) requires such a proceeding if the company has not had one within 6 months prior to the effective date of Chapter 288. Essentially this requirement applies to the "stay-out" companies described above. If a company must have a revenue requirement proceeding, the information required by this proposed provision will be filed with the rate case.

The third proposed change is to redefine the requirement contained in Section 3(C)(2) (presently 3(B)(2)) that requires compliance with the requirements of the access parity statute, 35-A M.R.S.A. § 7101-B. The present language simply states that carriers seeking USF must implement intrastate access rates that "meet the requirements" of the statute. Because of the uncertainty associated with this statute (described in detail above in our discussion of Chapter 280), we propose here (as in Chapter 280) to make specific the requirement that a carrier's intrastate access rates must be less than or equal to its interstate access rates. The provision also describes the effective dates of the interstate access rates to which the intrastate rates must conform, based on the dates on which the statute requires intrastate access rates to be adjusted (May 30 of each odd-numbered year).

Finally, we request comment on whether to modify the provision in Section 5(B) that allows contributing carriers to impose a surcharge on their retail customers equal to the "Revenue Percentage" that those carriers must pay into the Fund pursuant to Section 4. For interexchange carriers, Such a surcharge arguably constitutes a substantial windfall. Many rural LECs (primarily the "amortization" companies that will receive formal funding form the MUSF early in 2003) have access rates that exceed the statutory levels by a substantial amount. By paying those excessive access rates, interexchange carriers have for some time been providing what we have described above as "informal USF." Funding from the MUSF converts informal USF to real USF. IXCs will save more money by shedding the informal burden of paying excess access rates (because they have been bearing the entire burden) than they will incur by paying a USF contribution.

The present cost of paying excessive access rates is presumably part of those carriers' total costs. It is also likely that they attempt to include this cost in their retail rates. Business entities that seek to earn a profit normally attempt to recover all of their costs through their pricing. If they do not, they lose money and go out of business. Allowing IXCs to impose a specific surcharge for their USF contribution might amount to double recovery unless they simultaneously lowered prices by an offsetting amount. Although a requirement to lower prices might seem a reasonable alternative, it is problematic because, over time, interexchange retail toll rates change for a variety of market-related reasons and it would be impossible to determine whether a carrier has maintained the required decrease.

While we do not specifically propose in this rulemaking that IXCs be precluded from imposing a surcharge on their retail customers, we do seek comment about whether we should add such a provision to the Rule. A draft for such a provision is included as Attachment 3A (following Attachment 3, the draft for revised Chapter 288.) The draft states that a carrier that offers interexchange service (whether alone or in conjunction with local service) cannot impose a retail surcharge unless it proves that the burden imposed by its USF contribution exceeds the savings it realizes as a result of lower access rates that are associated with orders allowing USF for rural carriers, i.e., the conversion of informal USF to formal USF.

## IV. RULEMAKING PROCEDURES

This rulemaking will be conducted according to the procedures set forth in 5 M.R.S.A. §§ 8051-8058. No public hearing will be held on this rulemaking unless requested by any five interested persons as provided in 5 M.R.S.A. § 8052(1). Written comments on the proposed Rule may be filed with the Administrative Director until December 30, 2002. Written comments should refer to the docket number of this proceeding, Docket No. 2002-687 and sent to the Administrative Director, Public Utilities Commission, 242 State Street, 18 State House Station, Augusta, Maine 04333-0018 or may be filed electronically at http://www.informe.org/puc/upload.html.

If, on the request of five persons, a hearing is held, please notify the Public Utilities Commission if special accommodations are needed in order to make the hearing accessible by calling 287-1396 or TTY 1-800-437-1220. Requests for reasonable accommodations must be received 48 hours before the scheduled event.

In accordance with 5 M.R.S.A. § 8057-A(1), the fiscal impact of the proposed Rule is expected to be minimal. The Commission invites all interested parties to comment on the fiscal impact and all other implications of the proposed rule.

Accordingly, we

O R D E R

1. That the Administrative Director shall notify the following of this rulemaking proceeding:

a. All telephone utilities, mobile telecommunications carriers and radio paging service providers in the State;

b. All persons who have filed with the Commission within the past year a written request for Notice of Rulemaking;

d. All commenters in prior rulemaking proceedings for Chapters 285 and 288 *(*Docket Nos. 2000-387 and 2001-230.

2. That the Administrative Director shall send copies of this Notice of Rulemaking and attached proposed rule to:

a. The Secretary of State for publication in accordance with 5 M.R.S.A. § 8053(5); and

b. Executive Director of the Legislative Council, 115 State House Station, Augusta, Maine 04333-0115 (20 copies).

Dated at Augusta, Maine, this 13th day of November, 2002.

BY ORDER OF THE COMMISSION

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Dennis L. Keschl
Administrative Director

COMMISSIONERS VOTING FOR: Welch
Diamond

COMMISSIONERS ABSENT: Nugent